

CETA ON INVESTMENT: THE DEFINITIVE SURRENDER OF EU LAW TO GATS AND NAFTA/BITS

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Abstract

Provisions on investment in the Comprehensive Economic and Trade Agreement (CETA) between Canada and the EU, both on substance and on dispute settlement procedures, are the culmination of a long process of replacement of the original EEC approach to establishment by the approaches followed by the GATS, the North American Free Trade Agreement (NAFTA) and Bilateral Investment Treaties (BITs). The article analyses this process; it focuses in particular on the law of external relations but takes into account the evolution of the law of the internal market and can also be read from this perspective as, in the authors' opinion, the evolution in the former throws light on the latter. The article intends to leave the legal facts to speak by themselves. By unveiling their rationale, it also gives rise to political concerns regarding the evolution of the law. As CETA limits the ability of the EU to legislate and erodes the ECJ's role, the article leads to the conclusion that the underlying rationale for the evolution, both in the internal and the external areas, has not been that of promoting integration but that of deregulation.

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1. Introduction¹

This article attempts to demonstrate how, in the specific area of investment and in the framework of external economic relations, the original approach followed by the European Economic Community Treaty and the European Community Treaty² has been replaced by the importation of the approaches followed by the GATS, NAFTA and BITs. This has been the result of a rather long evolution, but, in our opinion, CETA is an important leap in this evolution which, if it finally enters into force, will complete (maybe irreversibly) the surrender of EU law to GATS and NAFTA/BITs.

The surrender is, first, terminological: GATS and NAFTA/BITs concepts and terminology have polluted EC and EU terminology. Secondly, the legal content (and the underlying political approach) of EU law is concerned,

1. The authors have developed these arguments over a very long period, but never before put them together nor applied them to CETA. Some of the main ideas were first developed in the highly influential Opinion of the Legal Service of the EU Council of 10 Apr. 1996 (Doc. 6393/96, Restreint, JUR 106, ECOFIN 49, WTO 62, RELEX 13, OCDE 1, ECO 96, MDC 2, DRS 7). Thereafter, the main references are: Torrent, *Derecho y Práctica de las Relaciones Económicas Exteriores en la Unión Europea* (Editorial CEDECS, 1998); Torrent, “Regional integration instruments and dimensions” in Devlin and Estevadeordal (Eds.), *Bridges for Development. Policies and Instruments for Trade and Integration* (Inter-American Development Bank, 2003), pp. 119–135; Torrent, “Derecho comunitario e inversiones extranjeras directas: Libre circulación de capitales vs. Regulación no discriminatoria del establecimiento. De la Golden Share a los nuevos Open Skies”, 22 *Revista Española de Derecho Europeo* (2007), 283–312; Pellisé and Torrent, “Les relations entre entreprises et capitaux publics et entreprises et capitaux privés en droit communautaire et en droit espagnol”, in Rodríguez Iglesias and Ortiz Blanco (Eds.), *Proceedings of the FIDE XXIV Congress*, Vol. 3 (Servicio de Publicaciones de la Facultad de Derecho UCM, 2010); Torrent, “The contradictory overlapping of national, EU, bilateral, and the multilateral rules on foreign direct investment: Who is guilty of such a mess”, 34 *Fordham International Law Journal* (2011), 1377–1399; Torrent, “Pourquoi un revirement de la jurisprudence ‘golden share’ de la Cour de Justice de l’Union européenne est-il indispensable?” in *A Man for All Treaties – Liber Amicorum en l’Honneur de Jean-Claude Piris* (Bruylant, 2012); Fernández-Pons and Torrent, “The (unnoticed?) contradictory overlapping of international and domestic rules on FDI: Getting the legal facts right”, Singapore Conference of the Society of International Economic Law – SIEL (2012), <papers.ssrn.com/sol3/papers.cfm?abstract_id=2091211> (last visited 11 June 2017); Torrent and Polanco, *Analysis of the Upcoming Modernisation of the Trade Pillar of the European Union–Mexico Global Agreement*, Paper requested by the European Parliament’s Committee on International Trade (2016), <www.europarl.europa.eu/RegData/etudes/STUD/2016/534012/EXPO_STU(2016)534012_EN.pdf> (last visited 11 June 2017) as well as the materials developed by Fernández-Pons, Lavopa and Torrent for the online course “Legal instruments of international economic relations and regional integration” set up by UNCTAD’s Virtual Institute and Fundación CEDDET.

2. One of the purposes of the article is to analyse the evolution of EC and EU law. This creates some difficulties in the drafting because sometimes the references must be to the EEC Treaty and EC Treaty, others to the TFEU and in some cases the reference is to all the Treaties and their evolution. Knowledgeable readers will not be misled by this.

mainly that on “investment”: many readers will probably conclude that CETA brings to a new height the deregulatory/antiregulatory approach that has characterized the European Commission’s initiatives and the ECJ case law in the last two decades. Thirdly, it ends up by eroding one of the main pillars of EU integration: the role of the ECJ with respect to the Treaties system.

From another perspective, this article dwells on a very general issue that jurists, in particular those acquainted with the methods of systematic and teleological interpretation, know well: the very undesirable dreadful consequences that can result from copying legal rules from one context (e.g. GATS and NAFTA/BITs) and pasting them into a completely different one (that of the EU’s external economic law and policy). This should also be well known to politicians and experts in political analysis, but it seems not to be so.

The path followed by this article is not new, in particular since the publication of Spaventa’s seminal work on the evolution of the ECJ case law on the right of establishment.³ The article’s novelty lies in three aspects. First, it focuses on the EU law of external economic relations and not in the evolution of the law and case law on the internal market (even if it takes this into account and many readers can also read the article from this perspective). Second, it compares the EU law of external relations with GATS, NAFTA and BITs approaches on the regulation of investment. Third, it leaves the legal facts to speak for themselves; for this reason, is why we do not take as background the different “theories” that try to explain or justify jurisprudential interpretations,⁴ but an analytical framework able to shed light on, and sharpen, the reading of legal provisions.

Because of its purpose, the article is based essentially on the examination of primary sources (the EU Treaties, ECJ case law, and the texts of international

3. See Spaventa, “From *Gebhard* to *Carpenter*: Towards a (non-)economic European constitution”, 41 CML Rev. (2004), 743–773; Spaventa, annotation of Case C-442/02, *Caixa-Bank France v. Ministère de l’Économie, des Finances et de l’Industrie*, 42 CML Rev. (2005), 1151–1168.

4. Spaventa builds her articles on the discussion of three such theories, or “conceptual frameworks”: the discrimination theory, the double burden theory and the market access theory. However, she ends up by accepting that none of them is able “to explain” the “recent” – in 2004 – ECJ “case law on free movement of services and establishment” (Spaventa (2004), op. cit. *supra* note 3 at 768). So, she builds a new theory on the basis of the citizenship of the Union, invoking an individual “right to exercise an economic activity free of disproportionate regulations” (ibid., 764) and a Member State “duty to refrain from disproportionate interference with fundamental, economic and non-economic, rights” (ibid., 772). That seems very debatable. Could it be that what explains the case law is simply an inadequate understanding of the rules and their implications by the ECJ? Is the ECJ above the suspicion of political error in a context in which everyone agrees that the EU as a whole has not always taken the right decisions on some fundamental issues in the last decades? Is the ECJ aware that with the evolution of its case law it is making the EU law resemble more and more GATS and NAFTA/BITs?

agreements). Citations and analysis of well-known articles and case law are necessary, because, precisely, one of the main purposes of the article is to examine under a new light provisions that are widely known and cited. According to standard practice, we will refrain from including long quotations of provisions in the main text, but we strongly advise the reader to re-read these very carefully: experience shows that one never fully understands provisions apparently known by heart; they always offer new angles when looked at from new perspectives.

After this introductory section, there follows an outline of the analytical framework used (section 2). Section 3 describes the “triangle” within which the article is located: EU primary law is compared to GATS, on one side, and to NAFTA/BITs, on the other; the discussion of each of the sides of the triangle can seem quite trivial to the specialists of each legal order, but the comparative analysis is necessary, and has received insufficient attention in the literature. Section 4 describes how EU law has been colonized by GATS and discusses the evolution of EU policy and the ECJ’s case law in the areas covered by the article. Sections 5 and 6 explain how CETA combines (and compounds) the influences of GATS and NAFTA/BITs, addressing substantive provisions and so-called investor-to-State dispute settlement mechanism. Some conclusions, in the seventh section, close the article.

2. The analytical framework: The “legal toolbox” of international economic relations and regional integration

International economic relations and regional economic integration make use of a “legal toolbox” in order to mould or shape reality and achieve their goals. This comprises three types of rules, two techniques for enacting them, and two methods for the definition of the scope of obligations. We leave aside the institutional arrangements of each different integration process or those set up by different international economic agreements, because we rather conceive them as instruments to guarantee effectiveness of the rules.⁵

2.1. The three types of rules

Three main types of rules exist in order to conduct international economic relations and to develop a process of regional economic integration.

5. This analytical framework is extremely simple and some readers may even consider it trivial. However, and quite surprisingly, it has not been put forward in the literature and is not widely used for comparative analysis.

The first is to impose obligations on liberalization of access to markets. The second is to impose certain non-discrimination obligations on the legal regime applicable to transactions and operations covered by the agreements – basically most-favoured-nation (MFN) status, or national treatment (NT) obligations – without prejudging the remaining content of domestic legislation. The third is to create uniform legislation establishing common rules for transactions and operations covered by each agreement. These three types of rules differ legally and in terms of their political and economic implications; interpreting, or applying one in order to transform it into another is very dangerous because, at the very least, it creates legal and political confusion.

The obligations liberalizing market access are strictly limited in scope to *international transactions*.⁶ The obligations that regard treatment (in particular if they apply to treatment of foreign firms and professionals after their establishment in the host country), as well as uniform or harmonized rules, apply essentially to *internal transactions* – unless they are simple rules of non-discrimination of treatment between foreigners (MFN rules) in the access to the domestic market. These are much more “intrusive” politically (and, as a consequence, much more difficult to tackle) than rules liberalizing market access. But many will agree on the thesis that integration cannot rely solely on liberalization obligations in order to make sense in legal and political terms. Furthermore, seen from a strictly economic perspective, market integration is not achieved by simply liberalizing access as long as internal rules continue to differ.⁷

6. A clarification is needed here. The analytical framework that we propose must go behind the terminology, very often misleading, used in many treaties and agreements. One of the purposes of the article is, precisely, that of explaining how, in very important instances, “concepts hide reality”. As we shall see later on, one very relevant case is that of Art. XVI GATS (and articles of agreements that have copied-and-pasted it in other contexts) whose title is “Market access” but whose main rules (e.g. the prohibition in Art. XVI(2)(a) of GATS of “limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test”) become rules of our third type (rules of uniform law) if they are applied also to domestic service providers and not only to foreign ones. It should be noted that Art. XI GATT, entitled “General elimination of quantitative restrictions”, is just a rule on market access according to our classification, because it specifically forbids import and exports restrictions. As underlined by Pauwelyn, “Rien ne va plus? Distinguishing domestic regulation from market access in GATT and GATS”, 4 *World Trade Review* (2005), 169, Art. XVI GATS is also a rule on domestic regulation, because it “also applies to measures that cover both foreign and domestic services or service suppliers”, including measures “indistinctly applicable to imports and domestically”.

7. The best example of this lies in the complete liberalization of capital movements between EU Member States brought about, first, by secondary law (Directive 88/361/EEC of 24 June 1988, O.J. 1988, L 178/5) and, then, by primary law (the new Chapter on capital movements inserted in the EC Treaty by the Treaty of Maastricht). For many (and in the mind of the General

Rules on non-discriminatory treatment and rules that create uniform law also pose a difficult political dilemma, however. Uniform rules serve integration goals extremely well, but are difficult to set up for three reasons. First, they are technically difficult to agree on because of the different legal traditions and contexts of the parties, making it challenging to agree even on terminology and definitions. Second, they are intrusive in relation to the internal political process in the sense that they lock-in commitments under international law, which precludes policy changes that may follow a switch of domestic governments and political majorities. And third, they threaten the adaptability of the regional or international scheme, because they are more difficult to change than domestic rules, requiring a consensus (or in some cases a qualified majority) among all parties.

Obligations regarding treatment reduce these difficulties by allowing much greater discretionary power when it comes to domestic legislation, provided that its content is non-discriminatory. But such obligations also pose other difficulties. Uniform rules follow the same logic and have the same scope at the international and domestic levels. This is not the case with international obligations on treatment (in particular on treatment of enterprises). These obligations have a sort of double universality: they apply to all sectors and they cover all aspects of the legal framework applicable to enterprises. On the domestic front, however, there is not a single rule or set of rules that has this double universality.⁸ Different rules apply to different sectors (energy or air transport, for example) and to different aspects of the legal framework (from company law to taxation, through labour conditions or expropriation, for example). With the sole exception of the European Community, experience shows that far-reaching obligations on treatment of enterprises can be accepted only if they are accompanied by a list of exceptions. But this list of exceptions tends to expand exponentially as the number of parties to the

Directors of the Treasury during the negotiations of the Maastricht Treaty), this complete liberalization implied the integration of Member States' capital markets. It was soon discovered that this was not at all the case: as the huge amounts of internal legislation regulating domestic capital markets remained different, the differentiation between Member States' capital markets remained also, but with free movement of capital between them: the issue of the "EU single regulator for capital markets" was born.

8. This notion of "double universality" was one of the more salient and relevant aspects of the EU Council's written observations in the framework of the procedure leading to Opinion 1/94, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property*, EU:C:1994:384. The introductory part of these Observations was later re-elaborated as a conference contribution: see Piris and Torrent, "Les problèmes juridiques posés à la Communauté Européenne par la conclusion des accords de Marrakech" in SFDI, *La Réorganisation Mondiale des Échanges – Actes du 29ème Colloque de la SFDI* (Pedone, 1996).

agreement increases and, in the end, may overwhelm MFN and national treatment.

2.2. *The two techniques for the enactment of the rules*

Two different techniques are used for enacting international economic rules necessary for conducting international economic relations, as well as regional integration, and to provide a framework for international public activities. The traditional distinction between “intergovernmental” and “supranational” aims at defining them, and the political science distinction between “negative” and “positive” integration relates also to these two different techniques, but these distinctions can lead to misunderstandings.⁹ It is therefore better to use the more neutral term “two techniques”: either to insert rules on substance into the treaty that must be complied with by the parties, or to institute some mechanism for creating new substantive legal rules within the framework of the treaty. We can refer to rules enacted by means of the first technique as “primary law” and to rules enacted by means of the second as “secondary law”. There are advantages and disadvantages to both techniques. The first tends to strengthen the risk of lack of flexibility and capacity for adaptation, and the second tends to have the opposite effect.

Any good student of European law knows this distinction. However, it seems to us that a brief discussion of it remains necessary.

Firstly, this is because an adequate balance between the uses of the two techniques must be reached in order to achieve the political or economic objectives pursued. It could easily be argued, but it is not the purpose of this article, that the Treaty of Maastricht upset the successful equilibrium in the use of the two techniques that the Treaty of Rome and its modification by the Single European Act had achieved in the past.¹⁰ It can also be argued that, for

9. E.g. when “supranationality” is discussed as a sort of characteristic of EU integration, forgetting, as we discuss in the text, that “supranational mechanisms” of law creation also exist in other frameworks, and that many of the foundations of the EU integration process are “intergovernmental”. Besides, it is also forgotten that the distinction between “negative” and “positive” integration, from an EU perspective, relates to the substance of the rules (harmonizing legislation or prohibiting Member States legislation) and this can be the outcome of either primary or secondary law. One of the pieces of legislation discussed later in the article, the Bolkestein Directive, is a good example of “negative” integration (in substance) by a method that usually characterizes “positive” integration (secondary law).

10. The argument would go in the sense that in the new provisions on economic policy (including movement of capital), “too much” in the way of primary law obligations was imposed on Member States and “too little” competence was conferred on the EC to enact secondary law.

the right of establishment, what it is needed is an adequate balance between the obligations of primary law and the harmonization of Member State legislation enacted through secondary law. Trying to “compensate” the lack of the second by a very broad interpretation of the first is dangerous and is not neutral at all.

Secondly, the distinction should be discussed because it is often forgotten (and, what it is worse, often denied when this evident legal fact is brought into the discussion) that the production of “secondary law” is not restricted to the framework of the EC Treaty and the TFEU. It is also found in a number of preferential trade agreements (PTAs). It is true that NAFTA relies exclusively on primary law, but even the Dominican Republic-Central America FTA (CAFTA-DR) creates a mechanism for the enactment of secondary law (certainly with a very limited scope).¹¹ Two much more important examples are: (a) the old Association Agreements of the European Community (and its Member States) with third countries, from the 1963 Agreement of Ankara with Turkey to the 1997 Agreement with Mexico and the “Euromediterranean” agreements, through the 1992 European Economic Area (EEA) Agreement. All of them set up Joint Councils and Committees endowed with very wide competences to produce secondary law; and (b) the WTO, whose Ministerial Conference creates secondary law in two such crucial areas as waivers¹² and new accessions.¹³ The fact that this creation of secondary law goes together with the practice of reaching decisions by consensus is irrelevant for our argument.

2.3. The two methods for the definition of the scope of the obligations

The WTO GATS and later negotiations on services and investment have made fashionable the jargon of “positive” and “negative” lists as methods to define the scope of obligations in these areas. However, these techniques apply to any area covered by regional integration or, more generally, by international economic legal rules.

On the one hand, it is possible to define general obligations subject to some exemptions (the obligations apply “unless ...”). These exemptions¹⁴ exclude

11. See Art. XIX(1) CAFTA-DR, which creates its Free Trade Commission. Para 3 of this Art. confers specific competences to the Commission to enact secondary law.

12. Art. IX:3 WTO Agreement.

13. *Ibid.*, Art. XIII(2).

14. “Exemptions” (which exclude the application of obligations to cases covered by them) must be distinguished from “exceptions”, such as the “General Exceptions” contained in Art. XX of GATT and Art. XIV of GATS, which presuppose: that obligations are applicable to a measure; that the measure is inconsistent with any of those obligations; but that the measure can, ultimately, be justified if it has been taken under the conditions provided in the exception (e.g. it is a measure inconsistent with the general obligation on MFN Treatment of Art. II(1) of

from the rules' scope of application some specific sectors, aspects or areas. This is the case, for example, with Article II of GATS (MFN obligation) and its Annex of exemptions, or with many obligations imposed by the investment Chapters of PTAs concluded by the United States.

On the other hand, it is also possible to define the content of the obligations, but leave the determination of their field of application to a list of commitments: the obligations apply "only insofar as ..." specific cases are included into a list of specific obligations. For many, this approach, of a "positive list", seems synonymous with the schedules of "Specific Commitments" in the framework of GATS (which certainly applies this technique, as we shall see). However, it is also applicable to GATT (the schedules of concessions of Members in the framework of GATT's Article II are undoubtedly "positive lists").

It can be argued that "negative" and "positive" lists can lead to the same results.¹⁵ We will not follow this argument for the following reasons. Of course, the content of a general obligation can be nearly nullified if the exemptions (the negative list) are very broad and deep in scope (or if a very broad "horizontal" exemption is included). And the content of an obligation whose scope is determined through a positive list can be very broad and deep if the list is very large. However, the underlying logic of the two techniques is very different. In the negative list approach, the rationale (and the practice in most relevant cases) is to establish, or envisage, a "final stage" of full liberalization (in the case of a rule on market access) or of unrestricted non-discriminatory treatment (in the case of a rule on treatment), a final stage that can maybe be reached, or approached, through secondary law. In the positive list approach, the rationale is different: the idea is to define a "floor" of liberalization or non-discrimination, which should not be rolled back by changes in internal policies. Furthermore, if we consider the "double universality" of the notion of treatment to enterprises (applicable to all sectors and covering all aspects of that treatment), we can argue that a list of specific exemptions simply means that we are brought to a "universality of a lower level", but ultimately universality (because the negative list defines only the sectors and aspects excluded but not those that are included, which remains

GATS, but it is necessary to protect public morals or human health). However, exceptions (carefully drafted) can be an alternative to a "negative" list of exemptions. "Exemptions" are often presented in the form of "reservations".

15. See e.g. Fink and Molinuevo, "East Asian Free Trade Agreements in services: Key architectural elements", 11 *Journal of International Economic Law* (2008), 263–311.

undefined: the list is indefinite).¹⁶ Whereas a positive list of sectors will never reach any level of “universality” (it will simply be shorter or longer, but always definite).

3. The point of departure: EC law on “investment” versus GATS and NAFTA/BITS

We must begin by emphasizing a fact so important and incontestable, but surprising for many (and whose importance is not adequately stressed by most of those who already know the fact): “investment” was, in principle, a notion completely alien to EC and EU primary law, until the very tangential insertion, by the Treaty of Maastricht, of the terms “direct investment” in Article 57 EC (64 TFEU), concerning possible exceptions to the general principle of free movement of capital, and the fairly recent introduction, by the Lisbon Treaty of 2007, of the terms “foreign direct investment” within the matters covered by the Common Commercial Policy.¹⁷

Outside the EU framework, the notion “investment” has been traditionally used, including the distinction between “portfolio” and “direct” investment. Differentiating between these two types of investment is not easy. Quite often, portfolio investment is defined as “cross-border transactions and positions involving equity or debt securities, other than those included in direct investment or reserve assets”,¹⁸ which, unsatisfactorily, makes the definition circular and dependent on what is defined as “direct investment”. Taking both types of investment together, they are defined very often as depending on distinctions like “short term/long term” or the existence or not of “a lasting interest”.¹⁹ These definitions are unsatisfactory because of their lack of precision and the impossibility to make them operational.

16. The distinction of different “levels” or “orders” of infinity is well established in mathematics since Cantor discussed and defined it 140 years ago. See e.g. Matson, “Strange but true: Infinity comes in different sizes”, *Scientific American*, 19 July 2007, <www.scientificamerican.com/article/strange-but-true-infinity-comes-in-different-sizes/> (last visited 13 June 2017).

17. See Arts. 206 (ex 131 EC, as amended) and 207 TFEU (ex 133 EC, as amended). On the scope of the European external competence in the field of investments, see Hinojosa Martínez, “El alcance de la competencia exterior europea en materia de inversiones”, 53 *Revista de Derecho Comunitario Europeo* (2015), 871–907; and the recent Opinion 2/15, *Free Trade Agreement between the EU and the Republic of Singapore*, EU:C:2017:376.

18. IMF, *Balance of Payments and International Investment Position Manual*, 6th ed., (IMF, 2009), p. 110, para 6(54), <www.imf.org/external/pubs/ft/bop/2007/pdf/bpm6.pdf> (last visited 12 June 2017).

19. Galeza and Chan, “What is direct investment?”, 52 *Finance and Development* (2015), 34–35.

3.1. *EU primary law*²⁰

The Treaty of Rome avoided these difficulties simply by avoiding the use of the term “investment” and distinguishing sharply between “movement of capital” and “right of establishment”. It devoted separate Chapters to the question of the movement of capital (Chapter 4 “Capital and payments”) on the one hand and that of the conditions of establishment (Chapter 2 “Right of establishment”) on the other. The Maastricht Treaty did not change that distinction although it amended the Chapter “Capital and payments” by substituting Articles 73b to 73g for Articles 67 to 73 (then renumbered Arts. 56–60 EC). The distinction remains in the currently in force TFEU, which, in accordance with the Treaty of Lisbon, replaces the old EC Treaty (see the regulation of the “Right of establishment” in its Arts. 49–55 and that on “Capital and payments” in Arts. 63–66).

The Treaty of Rome’s approach is not only sound but the best, in analytical and political terms. Indeed, capital movements from third countries and the establishment of third-country nationals or companies in a host State are two different matters, although there is a link between them. International capital movements are transactions or transfers involving monetary or financial assets between different countries; they are not necessarily connected with establishment in a different country from the one in which the capital in question originated. The establishment in one country of a third-country national or company presupposes the formation of a subsidiary undertaking, branch or agency, or the total or partial acquisition of an existing entity; the capital needed for such formation or acquisition need not come from the third country of the national or company in question or even from another third country: it may be obtained on the national financial market of the Member State in which the establishment takes place.

The “political rationale” underlying the regulation of these two aspects is quite different, and, generally, managed by different governmental authorities. The regulation of capital movements depends on “macroeconomic policy” and, in particular, on the balance and composition of the balance of payments, on exchange rate policy (which is interdependent and linked to balance of payments policies), on problems of monetary stability, inflation control, and so on. It is the domain of the ministries of economy and finance (and, within

20. The first four paras. of this subsection 3.1. are based on the Opinion of the Legal Service of the EU Council of 10 Apr. 1996, cited *supra* note 1, regarding the subject “provisions of the EC Treaty applicable to investment from third countries”. The Opinion had wide repercussions when it was issued, and it was resurrected in the context of the discussion of the introduction of a so-called “anti-Gazprom clause” in the third package of EU energy market legislation. See <www.ec.europa.eu/energy/en/topics/markets-and-consumers/market-legislation> (last visited 13 June 2017).

them, of the treasury undersecretaries and departments) and, in some countries, of central banks. The regulation of the right of establishment in the different economic sectors relies on other criteria and factors, because it is not a matter of macroeconomic policy, but of “sectoral policies” (e.g. banking policy; telecommunications policy; energy policy; industrial policy). It is the domain of the sectoral ministries (industry, agriculture, etc.).

The difference between the two issues can easily be seen when analysed in real-life situations. Countries combine *one* macroeconomic policy (“one” meaning a – more or less liberal – unique policy) with *distinct* sectoral policies on the right to establishment (“distinct” because they differ from one sector to another). Several developed and developing countries have carried out, in the last twenty-five years, a major liberalization of access of capital from third countries. However, these countries (at least not the developed ones) have not completely liberalized the establishment for foreign companies or the controls of domestic companies by foreign capital in sectors of major importance (for example, air transport, audiovisual or energy).

The Chapter on movement of capital uses mainly our first type of rules: rules liberalizing market access. Article 63 TFEU imposes a general obligation to liberalize market access (both to and from EU Member States and to and from third countries). And the following articles introduce a set of specific exceptions and confer on the EU some competences to enact secondary law. However, the Chapter relies mainly on our first technique, i.e. primary law; the role of secondary law is very limited and concerns only movements of capital from and to third countries.

Conversely, the approach of the Chapter on the right of establishment, which, on substance, has remained unchanged since the Treaty of Rome, follows a completely different approach from that of the Chapter on movement of capital. First, its main focus is not market access liberalization but guaranteeing national treatment and, second, it confers on the Union a very wide competence to produce uniform law through secondary law (conferral that has been used abundantly in the past, and continues to be used). Primary law includes also, in other Chapters, uniform law rules applicable to companies (owned or controlled by EU Member States or their nationals or under third country ownership or control), for example on competition. Below we will analyse the main provisions of this Chapter, discussing its rationale with reference to one of the ECJ’s founding judgments on this issue.

Article 49 TFEU certainly states that “[w]ithin the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited”. But it adds: “Freedom of establishment *comporte/importa/*

*umfasst/omvat*²¹ the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, *under the conditions laid down for its own nationals* by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital” (our emphasis). And Article 50 TFEU continues envisaging that: “*In order to attain freedom of establishment as regards a particular activity*, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, *shall act by means of directives ...*” (our emphasis).

We believe that this EC/TFEU approach to the right of establishment is perfectly sound. The right of establishment has a very different logic from that of free movement of goods, services, capital and workers.

Indeed, the exercise of the right of establishment precedes the introduction into the market of the goods, the services and even the capital (or, at least, the financial assets for which the monetary assets will be exchanged) that will then circulate within or between Member States. Access to *its own country market* of goods, services, capital and workers can be more or less restricted (e.g., on age of workers) but no legal act of “entry into the market” is required, i.e. no legal act is needed before a good or service that has been legally produced or supplied in the country, or before a financial asset that has been legally issued in the country, are bought and sold; and there is no need for a national to carry out a legal act before signing a work contract.

Contrariwise, this is exactly the meaning of “establishment”: nationals must “establish” themselves (as a firm or as a professional) within their own markets; *they must complete a series of procedures in order to be able to carry out economic activities: they must “enter” the market*. From the perspective of other Member States or third countries, establishment is also prior to the production of goods, provision of services or creation of financial assets in the host country. Therefore, as far as right of establishment is concerned, the essential distinction is that between unregulated right of establishment (in fact, scarcely regulated – e.g. setting up a toy shop – because there are nearly always requirements to be fulfilled before establishing as an independent professional or creating a firm) and a highly regulated right of establishment. When the right of establishment is regulated, there are two problems that

21. For the purposes of this study it is better to keep to the terms used in the four original linguistic versions of the Treaty of Rome and not use the term found in the later English version (“shall include”), which, quite obviously, has a different connotation. We do not want to enter into linguistic discussions because, as the ECJ has taught us, in the end these are solved by systematic and teleological interpretation.

appear, from the perspective of regional integration or international economic relations:

- a) The possible discrimination of professionals and firms from other States (a problem that the Treaty of Rome tackled through the introduction of a national treatment obligation), and
- b) The divergences between national legislation, and the “indirect barriers” to establishment that they would create towards other Member States (a problem the Treaty of Rome tackled by conferring on the Community the competence to enact uniform rules through secondary law).

The ECJ did not have any difficulty in interpreting this set of provisions in an early judgment, *Auer*,²² which, exceptionally, deserves an extensive quotation:

“As regards freedom of establishment, the realization of this objective is in the first place brought about by Article 52 of the Treaty which provides, first, that ‘restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period’ and, secondly, that such freedom of establishment shall include the right to take up and pursue activities as self-employed persons, ‘under the conditions laid down for its own nationals by the law of the country where such establishment is effected’.

In so far as it is intended to ensure, within the transitional period, with direct effect, the benefit of national treatment, Article 52 concerns only – and can concern only – in each Member State the nationals of other Member States, those of the host Member State coming already, by definition, under the rules in question.

However, it may be seen from the provisions of Articles 54 and 57 of the Treaty that freedom of establishment is not completely ensured by the mere application of the rule of national treatment, as such application retains all obstacles other than those resulting from the non-possession of the nationality of the host State and, in particular, those resulting from the disparity of the conditions laid down by the different national laws for the acquisition of an appropriate professional qualification.

With a view to ensuring complete freedom of establishment, Article 54 of the Treaty provides that the Council shall draw up a general programme for the abolition of existing restrictions on such freedom and Article 57 provides that the Council shall issue directives for the

22. Case C-136/78, *Ministère Public v. Vincent Auer*, EU:C:1979:34.

mutual recognition of diplomas, certificates and other evidence of qualifications.”²³

At no point does it cross the mind of the ECJ to interpret the right of establishment as a “right to establish”, i.e. as a prohibition on the regulation of establishment (c.q. “the rules in question” establishing “the conditions laid down for its nationals by the law of the country where such establishment is effected”). To begin with, “Article 52 concerns only – and can concern only – in each Member State the nationals of other Member States”. Member State laws “laying down the conditions of establishment for their nationals” – provided they are not discriminatory (*de iure* or *de facto*) – are not only not contrary to the Treaty, but they are the premise for its application. They can certainly give rise to “obstacles other than those resulting from the non-possession of the nationality of the host State and, in particular, those resulting from the disparity of the conditions laid down by the different national laws”. But the Community has the competence to harmonize these different national laws.

And this case law (and the elimination of those “obstacles”) could have been easily strengthened, at “the end of the transitional period”, and if the general programme implemented by the Council had been insufficient, by the application of the principle of equivalence in the establishment conditions, recognized by the ECJ, for example, in *Vlassopoulou*.²⁴

23. Ibid., paras. 19–22.

24. Case C-340/89, *Irene Vlassopoulou v. Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg*, EU:C:1991:193. Irene Vlassopoulou, a Greek lawyer registered with the Athens Bar, was refused her application for admission as a lawyer by the German authorities on grounds of not having adequate qualifications. The ECJ ruled that: “Article 52 of the EEC Treaty must be interpreted as requiring the national authorities of a Member State, to which an application for admission to the profession of lawyer is made by a Community subject who is already admitted to practise as a lawyer in his country of origin and who practises as a legal adviser in the first-mentioned Member State, to examine to what extent the knowledge and qualifications attested by the diploma obtained by the person concerned in his country of origin correspond to those required by the rules of the host State; if those diplomas correspond only partially, the national authorities in question are entitled to require the person concerned to prove that he has acquired the knowledge and qualifications which are lacking” (Ibid., para 23). In this manner, even in the absence of harmonizing legislation, the national authorities were required to recognize the qualification if found to be equivalent, or otherwise assess if any knowledge or training the applicant received in the host Member State sufficed to make up for what the applicant’s qualification lacked. See Hatzopoulos, *Le Principe Communautaire d’Équivalence et de Reconnaissance Mutuelle dans la Libre Prestation de Services* (Bruylant, 1999); and Armstrong, “Mutual recognition” in Barnard and Scott (Eds.), *The Law of the Single European Market. Unpacking the Premises* (Hart Publishing, 2002), Ch. 9.

3.2. *EC international agreements*

When the EC began to develop its external economic relations (alone or accompanied by its Member States in so-called “mixed agreements”), it got its inspiration from the EEC/EC Treaty itself. Bilateral agreements somehow mirrored the EEC Treaty, in particular in some of its more distinctive features: the inclusion of a Chapter on movement of salaried workers and the setting up of mechanisms to enact secondary law. The paradigmatic examples are, probably, the 1963 Association Agreement of Ankara with Turkey and, nearly 30 years later, the 1992 European Economic Area Agreement (EEAA), also an Association Agreement. Those two features allowed the ECJ to develop what is probably, at least from the perspective of external relations, its most progressive case law: the line of *Demirel/Sevince*.²⁵

For the EC, foreign direct investment (FDI) came to the fore as an extremely important policy issue at the end of the 1980s in the context of the disintegration of the Soviet bloc. Quite detailed provisions concerning both first establishment and treatment after establishment (named at the time “*operation*”) appeared in the first Association Agreements with Central and Eastern European countries (“Europe Agreements”) and even in the Partnership and Cooperation Agreement with Russia.

But these provisions did not change the EEC approach. They were mainly rules on treatment: not only national treatment but also, and in particular, MFN treatment, in order to guarantee that any treatment more favourable than national treatment granted by the third country to, for example, a US company or subsidiary, would also be extended to EU companies and subsidiaries. And the obligations were subject to a negative list of exemptions. Also, in conformity with the EEC Treaty’s approach, these provisions on establishment were different from those on movement of capital.

This approach has not completely vanished. The “copy-and-paste” approach that unfortunately characterizes the practice of international trade and investment negotiations so much has had, in this context, one positive consequence. The approach of the Europe Agreements is still clearly perceptible in the recent EU-Ukraine Association Agreement.²⁶ Its main provision on establishment (Art. 88, in Ch. 6, Section 2) envisages only national treatment and MFN treatment: no article on “market access” for establishment is included.

25. See Case C-12/86, *Demirel v. Stadt Schwäbisch Gmünd*, EU:C:1987:400; and Case C-192/89, *S. Z. Sevince v. Staatssecretaris van Justitie*, EU:C:1990:322.

26. Association Agreement between the EU and its Member States, of the one part, and Ukraine, of the other part (O.J. 2014, L 161/3) provisionally applied since Nov. 2014 concerning its political and cooperation provisions and from 1 Jan. 2016 for its trade and economic provisions.

3.3. GATS

The outcome of the Uruguay round of negotiations in the framework of GATT (1986–1994) was a new set of agreements: the WTO agreements, in which a new version of GATT is included but which also includes two completely new agreements: one on “trade in services” (GATS) and the other on “intellectual property rights” (TRIPs). The latter is irrelevant for the purposes of this article.

The first main characteristic of GATS is that its coverage is not limited to international exchanges of services but is extended also to establishment (in the services sectors). This is explicitly stated in its Article I:

“For the purposes of this Agreement, trade in services is defined as the supply of a service:

- a) from the territory of one Member into the territory of any other Member;
- b) in the territory of one Member to the service consumer of any other Member;
- c) *by a service supplier of one Member, through commercial presence in the territory of any other Member;*
- d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.” (emphasis added)

The first two “modes”,²⁷ (a) and (b), cover international exchanges of services as they have always been accounted for in standard balance of payments calculations. Mode 4, (d), mainly covers the hypothesis discussed in EU law in *Rush Portuguesa*²⁸ and its later case law. Mode 3, (c), is nothing other than establishment (or FDI, if one does not want to use the traditional EU law terminology but the terminology forged in other legal systems).²⁹ Indeed,

27. These four possibilities are named “modes” by later articles of GATS (e.g. Art. XVI). In the jargon, numerals (1 to 4) are used to refer to them, and not letters.

28. The GATS Annex on movement of natural persons supplying services under the Agreement establishes: “The Agreement shall not apply to measures affecting natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis”. Mode 4 refers to the hypothesis analysed in Case C-113/89, *Rush Portuguesa Lda v. Office national d’immigration*, EU:C:1990:142, whether *companies* have rights to move *their workers* when providing a “cross-border” supply of services (of course, under the GATS approach, this would also apply to establishment under its mode 3, “commercial presence”: whether companies, when establishing in a foreign country, can also move their workers).

29. Common sense tells us that, in political terms, mode 3 is much more important than the other modes. As an illustration of this, suffice to recall that, during the negotiations of the

Article XXVIII of GATS defines “commercial presence” as “(i) the constitution, acquisition or maintenance of a juridical person, or (ii) the creation or maintenance of a branch or a representative office, within the territory of a Member for the purpose of supplying a service”.³⁰

The second main characteristic of GATS, linked to the first, is that it extends to establishment (i.e. “commercial presence” in the terminology that GATS invents in its Art. I), for the first time in history, the “market access” logic and rules typically applied to international exchanges of goods (and services). This is the effect of its Article XVI on “Market Access”, which defines six types of measures that are in principle prohibited, unless otherwise specified in the respective Member’s Schedules.³¹

Some of the measures in Article XVI(2)(a) to (f) can be difficult to analyse, but these difficulties are irrelevant for the purposes of this article. It suffices to share an uncontested conclusion: Article XVI “market access” rules, in the terms of the legal toolbox analysed above in section 1, apply mainly to GATS

Uruguay round, the European Commission designed a method to evaluate the offers of the other participants in the negotiation, in which offers on mode 3 were attributed 50% of the total.

30. Art. XXVIII GATS continues by defining “juridical person of another Member” as “a juridical person which is . . . in the case of the supply of a service through commercial presence, owned or controlled by: 1) natural persons of that Member; or 2) juridical persons of that other Member identified under subparagraph (i)”. And, a “juridical person is: (i) ‘owned’ by persons of a Member if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Member; (ii) ‘controlled’ by persons of a Member if such persons have the power to name a majority of its directors or otherwise to legally direct its actions”. Therefore, the reader should be well aware that for the GATS (and for the EU and the Member States in the GATS framework), Lehman Brothers Spain Holdings Ltd, to take simply on example, is not a Spanish company (as the Spanish legislation clearly establishes and EU primary law recognizes), but a US company!

31. It is convenient to list the six measures because they are imported into the EU’s international agreements. They are:

- “(a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- (b) limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- (c) limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
- (d) limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- (e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- (f) limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.”

“mode 3”, i.e. commercial presence, i.e. establishment, in EU terminology. Therefore, GATS departs radically, in this all-important feature, not only from the EC Treaties but also, as we will see in the next sub-section, from NAFTA and BITs.

However, the practical effects of this are minimized by the use by GATS of the second method for the definition of the scope of obligations discussed in section 2: the “positive list” method. These “market access” obligations apply only in terms of paragraphs 1 and 2 of the Article XVI to *sectors where market-access commitments are undertaken and under the terms, limitations and conditions agreed and specified by (each WTO Member) in its Schedule*. And, in many cases, the Schedules are quite limited in scope and, normally, do not include “sensitive” sectors.

It must also be underlined that GATS, while covering establishment, does not extend its coverage to “investment” as a whole: it does not cover movement of capital, except when it is strictly necessary for the exercise of cross-border supply of services (mode 1) and foreign establishment (mode 3) in sectors included in the Schedules (see GATS footnote 8 to Art. XVI(1)).

Finally, it must also be emphasized that GATS does not include, in general, rules of uniform law (the third type of rule in our legal toolbox)³² nor does it set up a mechanism for its production (the second technique of our legal toolbox).³³ This also constitutes a sharp difference between GATS and EEC/EC primary law, which a) included some uniform law applicable to “post-establishment”, for example on competition, and b) conferred on the EC a wide competence to produce uniform law on the legal regulation of establishment. However, as mentioned above in footnote 6, GATS rules on market access for foreign companies become rules of uniform law if they are also applied to domestic companies. This is, again, a good example of the unexpected consequences of applying to FDI (i.e. establishment, in EU law) the “market access liberalization” rationale.

3.4. NAFTA/BITs

It is well known that PTAs with an investment chapter³⁴ and BITs have many characteristics in common. For the purpose of this article, the characteristics

32. The “Reference papers” that were introduced, for some sectors, after the finalization of the Uruguay round are very limited in scope and depth and do not invalidate this general assertion.

33. Without prejudice to the applicability, in the GATS framework, of the general provisions allowing the WTO to produce secondary law, in particular in the areas of waivers and accessions, mentioned in section 2 *supra*.

34. The Canada-US FTA (CUSFTA) was a pioneer in this respect: it was signed by the leaders of both countries on 2 Jan. 1988. It was among the first trade agreements to address

of these international investment agreements (IIAs) can be summarized as follows:

- (i) they cover, with a single set of interrelated provisions on “investment”, both movement of capital and establishment. This is an essential difference with both EC/EU primary law and GATS, which either differentiate between these two topics (in the case of EU primary law) or only cover establishment – i.e. “mode 3” (commercial presence), in the case of GATS;
- (ii) they rely almost exclusively on primary law (an essential difference with EC/EU law);
- (iii) they introduce an ambitious set of provisions of uniform law, in particular on direct and “indirect” expropriation and “fair and equitable treatment”.³⁵ This does not create a difference with EC/EU primary law, which, as we have seen, also includes provisions of uniform law applicable to companies in their operation, even if the approach and scope of these provisions are very different from those of NAFTA/ BITs. But it does create a difference with GATS, which generally does not use this type of rules;
- (iv) they introduce an investor-State dispute settlement (ISDS) mechanism that allows foreign companies to initiate proceedings against States in international fora without requesting any sort of permission or authorization from the governments of their countries of origin (“home States”).

It is also well known that there is an essential difference between NAFTA (and similar agreements) and recent BITs concluded by NAFTA members (notably the United States), on one side, and BITs concluded by EU Member States on the other side. The latter only cover the legal regime applicable to foreign investors *after* their investment in a host country (in the jargon, “post-establishment” treatment) while the former also cover establishment.³⁶

services and include a Chapter on “investment” (Ch. 16). Its definition of the scope of the Chapter on services (Art. 1401) goes half-way in the direction of GATS as far as the inclusion of establishment is concerned. The CUSFTA entered into force 1 Jan. 1989. It was superseded by NAFTA, which includes Mexico, signed in 1992 and entered into force 1 Jan. 1994.

35. “Indirect” expropriation and “fair and equitable treatment” are two notions born in this legal framework, without adequate equivalents in domestic legislation in most countries. This is why they have become the main legal and political arguments against BITs.

36. In the jargon, and under the influence of the term “post-establishment”, the term “pre-establishment” has been coined. This seems quite misleading as “pre-establishment” can cover everything. For analytical purposes, the distinction in scope relates to “post-establishment” and “establishment” (or “first establishment” if one wants to take into account what is mentioned in (ii) below).

However, this knowledge very often does not extend to two very important legal facts:

- (i) NAFTA and recent BITs concluded by NAFTA members cover certainly “establishment” but *they do not liberalize establishment, i.e. they do not include “market access liberalization” rules on establishment*. They share the EC/EU logic that the only rules applying to establishment are those on national treatment;
- (ii) BITs concluded by EU Member States certainly do not cover first establishment, but in practice foreign investors can very easily enlarge their scope to the establishment phase through “second establishment”, i.e. by setting up a subsidiary (a holding, for example) in the host State and then setting up a company from this subsidiary. Any discrimination against this second establishment would then be covered by the national treatment rule on “post-establishment” (of that first subsidiary/holding).

Another essential difference between US-led and EU Member States-led IIAs is not so well understood, either: while the former tend to include a negative list of exemptions, the latter do not. This difference has great legal and political importance, but a discussion lies outside the scope and purpose of this article.³⁷

4. The colonization of EC/EU law by GATS

The influence of GATS has been widespread outside the WTO framework where it was conceived. This fact has created an enormous amount of confusion, in particular when the influence has been exercised on bilateral or regional agreements that also included (or could include) a chapter on investment. In these cases, the use of the GATS notion of “trade in services” (and the set of definitions linked to it) provokes an overlap, at least potential, between the chapter on services and the chapter on investment traditionally found in PTAs, which normally uses a broad definition of investment that, obviously, includes FDI in the services sectors (i.e. mode 3 or commercial presence when moving to the chapter on services).

37. Indeed, the absence of a list of exemptions in EU Member States’ BITs implies that EU Member States systematically violate their BITs because they do not exclude from the scope of their national treatment obligation the EC/EU measures that do not grant national treatment to foreign investors established in EU Member States (e.g. in sectors of such a great importance as audiovisual and air transport). See, on this, Fernández-Pons and Torrent, *op. cit. supra* note 1.

4.1. *EU primary law*

The EC and its Member States seemed to welcome the GATS approach wholeheartedly. The European Commission used it in order to pursue its long fight to transform the Treaty provision on the Common Commercial Policy into an article embracing the whole area of external economic relations.³⁸ After failing in the negotiations of the Treaties of Maastricht and Amsterdam, it finally had a partial success in the Treaty of Nice, which introduced the notion of “trade in services” in the definition of the scope of the Common Commercial Policy.

This first colonization of EU law by GATS could and should have been easily redressed by the ECJ through systematic and teleological (and *de lege ferenda*) interpretation: why interpret “trade in services” differently from “trade in goods”, including establishment within it, in the framework of the EC Treaty, which dedicates separate chapters to exchanges of services (and to exchanges of goods) and to establishment in all sectors without distinguishing whether goods or services are produced in them? Opinion 1/08 of the ECJ,³⁹ precisely on the interpretation to be given to GATS, should have been the right opportunity for emphasizing that “trade in services” had different meanings in the WTO and the EU legal order; but only the Spanish Government argued into this direction.⁴⁰ In their written observations, the Parliament, the Council and 14 governments meekly accepted the Commission’s thesis. The result was the confirmation of the first EU primary law surrender to GATS by accepting that, in the context of the EC Treaty as modified by the Treaty of Nice, “trade in services” has the same meaning as in the GATS context. Was the ECJ aware that its interpretation of “trade in services” would have an extremely short life? Or was this precisely the reason to issue it on 30 November 2009? Just the day after, on 1 December 2009, the Lisbon Treaty entered into force. From that moment on, the ECJ’s interpretation of “trade in services” became untenable because, as stated above,⁴¹ Article 207(1) TFEU also includes FDI in the definition of the coverage of the EU’s Common Commercial Policy. Therefore, it is no longer possible to continue interpreting “trade in services” as covering also the separate notion that appears in the same line, just eight words later, i.e. “foreign direct investment”.

38. See Torrent (1998), op. cit. *supra* note 1.

39. Opinion 1/08, *Conclusion of agreements for modification of GATS schedules of specific commitments*, EU:C:2009:739.

40. Ibid., para 120.

41. See *supra* note 17 and accompanying text.

4.2. EC's external economic law

In order to give a quick effect to this enlargement of the scope of commercial policy in the Treaty of Nice, the European Commission took advantage of the negotiation of the EU-Chile Association Agreement,⁴² which was taking place precisely between the dates of signature (26 Feb. 2001) and entry into force (1 Feb. 2003) of the Treaty of Nice.

The result was that the EU-Chile Agreement abandons the specific EC approach and adopts the GATS approach. In order to do so, the scope of its Chapter on establishment had to be artificially redefined, so as to exclude from it FDI/establishment in the services sectors,⁴³ already covered by the Chapter on trade in services through the copying and pasting of Article I GATS.⁴⁴ However, as GATS does not cover movement of capital, the importation of its approach was compatible, in conformity with the EC Treaty's approach, with the existence of a separate Chapter on movement of capital, whose provisions, nevertheless, are very shallow, except when they are linked to establishment.⁴⁵

The importation of the GATS approach also extends to that of the positive list method for the determination of the scope of obligations: the obligations apply only to the sectors inscribed in the schedule of commitments. *More importantly, this importation influenced the Chapter on establishment* (excluding establishment in services sectors, already covered, as just said, by the Chapter on trade in services). Indeed, the Chapter on establishment imports both (a) the use of positive lists for the determination of the scope of obligations (Art. 99 of the Agreement) and (b) decisively, the use of GATS Article XVI's market access rules (Art. 118(2) of the EU-Chile Agreement), which, again, is simply copied and pasted as Article 97. Article 98 on national treatment is also taken from Article XVII GATS.

42. Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, O.J. 2002, L 352/3.

43. Indeed, Art. 130 of the EU-Chile Association Agreement defines the scope of the Chapter on establishment as follows (emphasis added): "This Chapter shall apply to establishment in all sectors *with the exception of all services sectors*, including the financial services sector."

44. Art. 95 of the EU-Chile Association Agreement, on "Scope", provides (emphasis added): "(1) For the purposes of this Chapter, trade in services is defined as the supply of a service through the following modes: (a) from the territory of a Party into the territory of the other Party (mode 1); (b) in the territory of a Party to the service consumer of the other Party (mode 2); (c) *by a service supplier of a Party, through commercial presence in the territory of the other Party (mode 3)*; (d) by a service supplier of a Party, through presence of natural persons in the territory of the other Party (mode 4)".

45. See *ibid.*, Arts. 163–165.

4.3. *The evolution of the ECJ's case law*

The Commission has produced a very useful Guide to the ECJ case law on Articles 49 et seq. TFEU,⁴⁶ identifying two stages in the development of the case law on the right of establishment.⁴⁷

In the first stage, the ECJ applied the present Article 49 TFEU (ex 52 EEC) essentially as a provision on national treatment. Of course, the ECJ applied it very strictly (“Article 52 prohibits all discrimination, even if only of a limited nature”)⁴⁸ and taking into account not only “direct” (*de jure*) but “indirect” (*de facto*) discrimination.⁴⁹ In that phase, the ECJ also seemed perfectly aware that national treatment is not enough to guarantee “freedom of establishment” effectively, and must be complemented by the enactment of uniform law through secondary legislation, as we saw in the quoted *Auer* judgment.⁵⁰ The right of establishment at this point was conceived, fundamentally, as *national treatment plus harmonization*.

Later on, the ECJ, mainly on the initiative of the Commission, gave a decisive anti-regulatory orientation to its case law on the legal regime of companies and began to declare contrary to the Treaty Member States *non-discriminatory* legislation of high political significance. This has two main strands: one is the “golden shares” strand (covering establishment and

46. See European Commission, “Guide to the case law of the European Court of Justice on Articles 49 et seq. TFEU”, <www.ec.europa.eu/DocsRoom/documents/14687/attachments/1/translations> (last visited 13 June 2017).

47. On this evolution, see *inter alia*, Martín y Pérez de Nanclares, “El derecho de establecimiento” in López Escudero and Martín y Pérez de Nanclares (Eds.), *Derecho Comunitario Material* (McGraw-Hill, 2000), pp. 107–121; O’Leary, “The free movement of persons and services” in Craig and De Burca (Eds.), *The Evolution of EU Law* (OUP, 1999), pp. 377–416; Daniele, “Non-discriminatory restrictions to the free movement of persons”, 22 *EL Rev.* (1997), 191–200; Spaventa (2004), op. cit. *supra* note 3; Spaventa (2005), op. cit. *supra* note 3; and Fernández, “*Keck y Mithouard* y la libertad de establecimiento”, 22 *Gaceta Jurídica de la UE y de la Competencia* (2011), 5–7.

48. Case C-270/83, *Commission v. France*, EU:C:1986:37, paras. 21 and 24.

49. The national treatment obligation has been interpreted by the ECJ as applying both to “direct” and “indirect” discriminatory measures. The discrimination is “direct” when a measure explicitly treats nationals or companies from other Member States less favourably, e.g. requiring Spanish nationality for the exercise of private security activities (Case C-114/97, *Commission v. Spain*, EU:C:1998:519, para 31). The discrimination is “indirect” when a measure is presented as apparently neutral but, in practice, it places the national or company from another Member State in a disadvantageous position, e.g. by requiring residence in the country (Case C-351/90, *Commission v. Luxembourg*, EU:C:1992:266, para 19) or a national diploma in order to exercise an activity, in spite of the fact that the foreign diploma has already been recognized as equivalent by the host country universities (Case C-3/88, *Commission v. Italy*, EU:C:1989:606, para 8). This interpretation is perfectly compatible with the recognition to States of a very wide regulatory autonomy.

50. Case C-136/78, *Auer*, para 21, which was extensively quoted in section 3.1. *supra*.

movement of capital), in which the ECJ analysed non-discriminatory Member State provisions on establishment leaving aside the Chapter on establishment and moving to the Chapter on movement of capital. The foundational judgments of this strand are the *Golden Shares* judgments in *Commission v. Portugal*,⁵¹ *Commission v. France*,⁵² and *Commission v. Belgium*,⁵³ and the more spectacular later judgment concerning the German Volkswagen Law in *Commission v. Germany*.⁵⁴ The *Golden shares* case law has already been criticized by one of the present authors⁵⁵ and this article is not the place to discuss it further.

The second strand is that of *Gebhard*,⁵⁶ very aptly analysed in Spaventa's articles, mentioned above.⁵⁷ Here, the ECJ construes the first article of the Chapter on the Right of Establishment as a rule of market access, interpreting it as a sort of rule granting a "right to establish". The examples are numerous and some of them are well known. The more characteristic are, precisely, those that are completely meaningless in economic terms and simply embody the political approach of putting under suspicion the regulation of establishment when it is enacted by Member States and not by the Community/Union. One significant example would be Case C-140/03, *Commission v. Greece*.⁵⁸ In this judgment, the ECJ ruled that Greek legislation prohibiting qualified opticians from operating more than one optician's shop effectively amounts to a restriction on the freedom of establishment of natural persons within the meaning of Article 43 EC, notwithstanding the alleged absence of discrimination on grounds of the nationality of the professionals concerned. Another example of this trend is the case considering the inconsistency of Austrian legislation that made the establishment of new dental clinics dependent on a sort of "economic needs test".⁵⁹

Of course, some restrictions can be justified. Article 52 TFEU (ex 46 EC) already allowed "provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health". But this provision only addresses measures that introduce a "special treatment for foreign nationals", i.e. discriminatory measures (which would confirm, by the way, the idea that

51. Case C-367/98, *Commission v. Portugal*, EU:C:2002:326.

52. Case C-483/99, *Commission v. France*, EU:C:2002:327.

53. Case C-503/99, *Commission v. Belgium*, EU:C:2002:328.

54. Case C-112/05, *Commission v. Germany*, EU:C:2007:623.

55. See Torrent (2012), op. cit. *supra* note 1.

56. Case C-55/94, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano*, EU:C:1995:411.

57. See Spaventa (2004), op. cit. *supra* note 3, and Spaventa (2015), op. cit. *supra* note 3.

58. Case C-140/03, *Commission v. Greece*, EU:C:2005:242, para 27.

59. Case C-169/07, *Hartlauer*, EU:C:2009:141.

the Chapter on the Right of Establishment was intended to guarantee national treatment, and only discriminatory regimes needed “to be justified”).

The enlargement of the notion of restriction to encompass non-discriminatory measures has also certainly led to an enlargement of the possibilities of justification. But in the absence of a provision such as current Article 36 TFEU (ex 30 EC) of the Chapter on trade in goods, which enabled the *Cassis de Dijon* case law,⁶⁰ the ECJ has had to rely much more on its own (political?) judgement. Thus, in *Kraus*, the ECJ reflected that the lack of recognition of diplomas obtained in other Member States, even if considered a restriction in spite of being applied without discrimination, could be justified if “such a measure pursued a legitimate objective compatible with the Treaty and was justified by pressing reasons of public interest”.⁶¹

The category of “public interest” is open and covers, together with the typical reasons of “public order, security and public health”, other interests linked to consumer protection, loyalty in the contracts, fight against the fraud, preservation of the environment, and so on. The ECJ’s case law has identified a number of overriding reasons of public interest capable of justifying restrictions on the fundamental freedoms guaranteed by the Treaty.⁶²

However, besides responding to “overriding reasons relating to public interest”, the ECJ case law has added the requirement that the measures “must be suitable for securing the attainment of the objective they pursue” and “they must not go beyond what is necessary in order to attain it”.⁶³ A measure is considered suitable or appropriate for ensuring attainment of the objective “only if it genuinely reflects a concern to attain that objective in a consistent and systematic manner”.⁶⁴ And it must also pass the test of verification whether the objective may not be achieved by measures which are less restrictive. The measures thus remain additionally subject to a test of necessity and proportionality.

In the last few years, the ECJ has extended its case law to other non-discriminatory hypotheses, such as the regulation of ports and harbours

60. Case C-120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* (“*Cassis de Dijon*”), EU:C:1979:42.

61. Case C-19/92, *Kraus v. Land Baden-Württemberg*, EU:C:1993:125, para 32.

62. Public interests already recognized by the ECJ include the objectives of *road safety* (e.g. Case C-55/93, *van Schaik*, EU:C:1994:363, para 19, and Case C-54/05, *Commission v. Finland*, EU:C:2007:168, para 40 and the case law cited therein), *environmental protection* (e.g. Case 302/86, *Commission v. Denmark*, EU:C:1988:421, para 9, and Case C-309/02, *Radlberger Getränkegesellschaft and S. Spitz*, EU:C:2004:799, para 75) and *consumer protection* (e.g. Case 220/83, *Commission v. France*, EU:C:1986:461, para 20; Case C-442/02, *CaixaBank France*, EU:C:2004:586, para 21, and Case C-393/05, *Commission v. Austria*, EU:C:2007:722, para 52 and the case law cited).

63. Case C-55/94, *Gebhard*, para 37.

64. As concluded in Case C-531/06, *Commission v. Italy*, EU:C:2009:315.

and the relationship between the different types of companies operating within them.⁶⁵ A very recent example, *AGET Iraklis*,⁶⁶ deals with collective redundancies. The ECJ considers that Greek legislation in this area is contrary to the Treaty because it “constitutes a significant interference in certain freedoms which economic operators generally enjoy . . . and render(s) access to the Greek market less attractive”.⁶⁷

Another interesting episode in this jurisprudential saga is Case C-400/08, *Commission v. Spain*, concerning the establishment of shopping centres in Catalonia. The case can be easily summarized. The legislation challenged before the ECJ was enacted by the Catalan Parliament, establishing a regulation that limits the establishment of big supermarkets in medium or small urban centres. The uncontested objective of the measure was a combination of protection of small commerce and urban planning concerns (both extremely sensitive questions in Catalonia). All affected companies were Spanish juridical persons, because what is at stake is not the establishment of the company but the opening, by already established companies, of a new supermarket with no separate legal personality. The ECJ did not observe any discriminatory treatment but subjected the analysis of this legislation to the tests of necessity and proportionality, which it did not pass. In the findings, the ECJ argued, *inter alia*, that the protection of small and medium commerce cannot be included among the overriding reasons relating to the general interest admitted by EU law; therefore, the legislation was declared contrary to EU law.⁶⁸

It could be argued that there is nothing new on all this, and that it is the same rationale as the well-known *Cassis de Dijon* case law. This might be true, but there is a major difference: the subject matter of the Treaty Chapter on the Right of Establishment, as was discussed above, is completely different from that of the Chapters on “movement” of goods, services, capital and workers. In the case of the latter, national/domestic goods, services, capital and workers do not need to enter their own country markets: they are “already in”; thus, the first problem for foreign goods, services, capitals and workers is whether or not they “can enter” (and freely enter, in the framework of EU integration) the market of another Member State.

In the case of establishment, the subject matter is completely different: establishment for nationals is not beyond question (and, in fact, the question very often receives a negative answer: the authors of this article, for example, cannot establish themselves in their own countries as architects or bankers, to

65. Case C-576/13, *Commission v. Spain*, EU:C:2014:2430.

66. Case C-201/15, *AGET Iraklis*, EU:C:2016:972.

67. *Ibid.*, paras. 55–56.

68. Case C-400/08, *Commission v. Spain*, EU:C:2011:172.

simply take these two cases, because they do not fulfil the requirements to do so); thus, the problem for foreigners is not that of getting rid of the requirements applicable to nationals in order to get established, but whether or not they are subject to the same requirements. Therefore, the EEC Treaty approached the situation rightly when (a) introducing a very wide national treatment obligation (covering also, of course, *de facto* discrimination) and (b) giving the Community a very wide competence to harmonize Member State legislation.

Transforming EU integration into an instrument of deregulation of establishment is, certainly, a legitimate political objective. But it distorts the rationale of the treaties (*“le système des traités”*).

4.4. *The evolution of EU secondary law, mainly Directive 2006/123/EC concerning services in the internal market (the Bolkestein Directive)*

This trend of deregulation is also reflected in EU secondary law. Directive 2000/31 on E-commerce is very illustrative, for example:⁶⁹ regarding the establishment regime, it provides as a general principle, in Article 4(1), entitled “Principle excluding prior authorization”, that: “Member States shall ensure that the taking up and pursuit of the activity of an information society service provider may not be made subject to prior authorization or any other requirement having equivalent effect”. In the same line, with a much greater scope, is Directive 2006/123 relative to services in the internal market,⁷⁰ also widely known as the “Bolkestein Directive”⁷¹ from the name of the European Commissioner who most pushed for it, which is of decisive importance in the evolution of EU secondary law on the right of establishment. As it is sufficiently well-known, we merely summarize some comments on it for the sake of completeness.

69. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market (E-commerce Directive), O.J. 2000, L 178/16.

70. Directive 2006/123/EC of the European Parliament and of the Council of 12 Dec. 2006 on services in the internal market, O.J. 2006, L 376/36.

71. There is abundant literature on the Bolkestein Directive, its transposition and implementation. See *inter alia*, Barnard, “Unravelling the Services Directive”, 45 CML Rev. (2008), 323–394; De Waele, “The transposition and enforcement of the Services Directive: A challenge for the European and national legal orders”, 15 EPL (2009), 523–531; De la Quadra-Salcedo y Fernández del Castillo (Eds.), *El Mercado Interior de Servicios en la Unión Europea – Estudios sobre la Directiva 123/2006/CE Relativa a los Servicios en el Mercado Interior* (Marcial Pons, 2009); Stelkens, Weiß and Mirschberger (Eds.), *The Implementation of the EU Services Directive – Problems and Strategies* (TMC Asser/Springer, 2012); and Wiberg, *The EU Services Directive – Law or Simply Policy?* (Springer, 2014).

The Directive was explicitly inspired by the clamorously failed “Lisbon Strategy”, which (we should never forget this in order to understand the recent evolution of the EU) was supposed to transform the EU economy into the most competitive and dynamic knowledge-based economy in the whole world, already by 2010 (*sic*).⁷² It addresses the whole services sector both from the perspective of their free provision and of right of establishment. In its own words, “this Directive aims at creating a legal framework to ensure *the freedom of establishment* and the free movement of services between the Member States”. It recognizes that, without prejudice to the direct effect of Articles 49 and 56 TFEU, it would be “extremely complicated for national and Community institutions” to continue to address measures contrary to those provisions “on a case-by-case basis” and “through infringement procedures” as was being done.

The Directive’s Chapter III deals specifically with “Freedom of establishment for providers” (Arts. 9 and 15). Section 1 is entitled “Authorizations” and intends, essentially, to codify the ECJ’s case law commented above. Therefore, Member States’ authorization regimes must pass a threefold test of, not only non-discrimination, but also necessity and proportionality. The “overriding reasons relating to the public interest” that can justify the restrictions on free establishment refer also explicitly to ECJ case law. Furthermore, Article 14 includes a list of “prohibited requirements” (such as the “economic needs test”) and Article 15 sets up a list of “requirements to be evaluated” (such as “quantitative restrictions”, “requirements which relate to the shareholding of a company”, “requirements fixing a minimum number of employees” etc.). Concerning these “requirements to be evaluated”, each Member State must verify, besides their non-discriminatory character, their “necessity” with regard to an overriding reason relating to the public interest and their “proportionality”.

As is well known, the enactment of the Bolkestein Directive aroused a doctrinal debate, particularly intense in some countries.⁷³ The criticisms of the Directive are, in our opinion, perfectly justified from a strictly legal

72. See Directive 2006/123, Recital 4. The Lisbon Strategy was set out by the European Council in March 2000: “Presidency Conclusions”, Lisbon European Council, 23 and 24 March 2000, <www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00100-r1.en0.htm> (last visited 15 June 2017), see para 5.

73. See e.g., De la Quadra-Salcedo Janini, “¿Quo vadis Bolkestein? ¿Armonización o mera desregulación de la prestación de servicios?”, 22 *Revista Española de Derecho Europeo* (2007), 237–280; Parejo Alfonso, “La Directiva Bolkestein y la ley paraguas: ¿Legítima el fin cualesquiera medios para la reconversión del Estado ‘autoritativo’?”, 32 *Revista Española de Derecho Europeo* (2009), 431–467; Chang, Hang and Pelkmans, “The Services Directive: Trojan horse or white knight?”, 32 *Journal Eur. Int.* (2010), 97–114; and Grossman and Woll, “The French debate over the Bolkestein Directive”, 9 *Comparative European Politics* (2011), 344–366.

perspective (leaving aside the criticism of its underlying policy approach). It misuses secondary law, envisaged in principle to harmonize Member State legislation in the areas of provision of services and establishment. The Directive's confessed goal is not that one, but the prohibition of any Member State legislation and the introduction of a principle of "unrestricted freedom of establishment", subject only to "justified limitations". In a way, the Directive uses secondary law to modify primary law or, at least, unbalances its choice of types of rules. The Right of Establishment Chapter becomes no longer based on a) the acceptance of Member State regulated establishment, b) subject to a very strict national treatment obligation and c) to the possible enactment of EU harmonizing legislation. It is turned into a Chapter based on complete liberalization of access subject only to restrictions which are quite difficult to justify.

It is clear that some provisions of the Bolkestein Directive, such as the quoted Article 15 on "quantitative restrictions", have a wording and a rationale partially similar to GATS Article XVI on "market access", but there are some important differences: GATS establishes a prohibition of quantitative restrictions with the aforementioned system of "positive list" and, when the prohibition is applicable to a sector included in the list and there are no exemptions, a restriction can only be justified under the exhaustive exceptions set up in other Articles of the GATS. Article 15 of the Bolkestein Directive is more general, as it establishes a general obligation to "evaluate" these quantitative restrictions, but it also recognizes explicitly that they can be justified in the light of an "overriding reason relating to the public interest", an open clause which remains faithful to the ECJ case law.

Therefore, from the point of view of the "right to regulate" of the host State, both models (GATS and Bolkestein) have lights and shadows. But, as we will see in the next section regarding CETA, it is possible to design a new model much more restrictive of this right to regulate, dimming the lights and lengthening the shadows.

5. CETA on substance: Compounding GATS and NAFTA/BITs influences. The complete surrender of the original EC approach

In spite of the entry into force of the Treaty of Nice in 2001, Association Agreements with Eastern European and Mediterranean States continued to follow the old pre-Nice Association Agreements approach. We have already seen this in the case of the 2014–2016 Agreement with Ukraine. The analysis of the last "Euro-Mediterranean Association Agreements" is not so relevant

for the purposes of this article, because the last one signed is from 2002 (with Lebanon) and its Chapters on services and establishment are nearly empty of obligations.

In December 2009, as mentioned, the entry into force of the Treaty of Lisbon modified again the definition of the scope of the EU's Commercial Policy. As foreign direct investment was included explicitly in paragraph 1 of the new Article 207 TFEU, there was no longer a need to introduce it through the back door as GATS "mode 3"/commercial presence. A fully-fledged Chapter on foreign direct investment/establishment could be envisaged, taking as main templates NAFTA (and similar agreements) and BITs.

The European Commission moved immediately into this direction, with the acquiescence of the Council, the Parliament and Member State governments. The Commission has pushed its new policy in the framework of the agreements with Singapore (2015),⁷⁴ Vietnam (2016)⁷⁵ and, in particular, Canada (the EU-Canada Comprehensive Economic and Trade Agreement – CETA).⁷⁶ It has also been reported that this direction will be followed in the update/modernization of the agreements with Mexico and Chile.⁷⁷

However, the acceptance of the NAFTA/BIT framework has not meant the abandonment of the former GATS template. *Both influences have been compounded and, as a result, the original EEC/EC approach has been completely lost sight of.*

This evolution has reached its peak in CETA. CETA follows the same approach of the agreements with Singapore and Vietnam, with two main characteristics:

- a) Conservation of the GATS influence with the importation of its Article XVI as a rule of "market access", not only for international exchanges of services but also for establishment (in all sectors).
- b) Importation of the substantive rules typically found in NAFTA and BITs. They include, in particular, as mentioned in section 3.4,

74. See the text of the EU-Singapore FTA (authentic text as of May 2015) at <www.trade.ec.europa.eu/doclib/press/index.cfm?id=961> (last visited 15 June 2017).

75. See the text of the EU-Vietnam FTA (agreed text as of Jan. 2016) at <www.trade.ec.europa.eu/doclib/press/index.cfm?id=1437> (last visited 15 June 2017).

76. See the text of the CETA in Council of the EU, Interinstitutional File 2016/0206 (NLE), Brussels, 14 Sept. 2016, 10973/16, <www.consilium.europa.eu/en/press/press-releases/2016/10/28-eu-canada-trade-agreement/> and <www.ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/> (both last visited 15 June 2017).

77. Torrent and Polanco, op. cit. *supra* note 1; Torrent and Polanco, *Analysis of the Prospect for Updating the Trade Pillar of the European Union-Chile Association Agreement*, Paper requested by the European Parliament's Committee on International Trade (2016), <[www.europarl.europa.eu/RegData/etudes/STUD/2016/535013/EXPO_STU\(2016\)535013_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/535013/EXPO_STU(2016)535013_EN.pdf)> (last visited 15 June 2017).

notions completely unknown to EU primary and secondary law, such as those of “direct and indirect expropriation” and “fair and equitable treatment”.

CETA introduces a very meaningful change, however: for the determination of the scope of obligations, the method of the GATS “positive list” (still used in the agreements with Singapore and Vietnam) is *replaced* by that of the “negative list”, typical of NAFTA and some BITs, both in the Chapters on services and on investment/establishment. Therefore, obligations no longer apply “only if a sector is included in the Schedule of commitments and in the conditions in which it is included” (the method of the positive list, or “bottom-up” method); but obligations “apply to all sectors except if specific sectors and/or measures are included in a negative list of exceptions or reservations” (the method of the negative list, or “top-down” method). This change is particularly relevant when applied to market access in the Chapter on investment/establishment. The main provisions are Article 8(4) in the Chapter on investment, which, again, copies and pastes Article XVI of GATS with only very minor variations in drafting⁷⁸ (as well as Art. 9(6) of the Chapter on services⁷⁹) and Article 8(15), which states that “Articles 8(4) through 8(8) do not apply to ...” a list of exceptions, with references to the

78. See Art. 8(4) on “Market access”, in Ch. 8 “Investment” of CETA:

“1. A Party shall not adopt or maintain with respect to market access through establishment by an investor of the other Party, on the basis of its entire territory or on the basis of the territory of a national, provincial, territorial, regional or local level of government, a measure that:

- (a) imposes limitations on:
 - (i) the number of enterprises that may carry out a specific economic activity whether in the form of numerical quotas, monopolies, exclusive suppliers or the requirement of an economic needs test;
 - (ii) the total value of transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
 - (iii) the total number of operations or the total quantity of output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test;
 - (iv) the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment; or
 - (v) the total number of natural persons that may be employed in a particular sector or that an enterprise may employ and who are necessary for, and directly related to, the performance of economic activity in the form of numerical quotas or the requirement of an economic needs test; or
- (b) restricts or requires specific types of legal entity or joint venture through which an enterprise may carry out an economic activity.”

79. Art. 9(6) applies also to services the GATS Art. XVI provisions that can be so applied.

Schedules of exceptions (an equivalent provision exists in the Chapter on services).⁸⁰

As a result of the use of the negative list method, CETA has to include extremely long Annexes/Schedules of reservations and exceptions (Annexes I and II),⁸¹ in addition to the list of carved-out sectors (essentially the same as the EU-Vietnam and EU-Singapore agreements): 223 pages for the list of reservations for existing measures and liberalization commitments (on investment and cross-border supply of services); and 158 pages for the list of reservations for future measures. However, this negative list cannot, as a matter of principle, include the “new sectors” that will certainly develop in the future as a result of technological change. They will necessarily be covered by CETA’s liberalization provisions in the CETA approach (because they are not carved-out or included in the lists of exceptions).

CETA certainly fits within the evolution of EU internal secondary legislation and of the ECJ case law analysed in the previous section. However, it is an unprecedented leap in this evolution, which – if finally entering into force – may have irreversible consequences for the EU, due to the following reasons:

- (i) First, because the evolution of EU internal secondary legislation and of the ECJ case law is addressed to (one could say, for the sake of clarity, is addressed “against”) Member States, and is not necessarily applicable with the same criteria to EU’s secondary law.⁸² Therefore, in the EU framework, the strengthening of the restrictions imposed on Member State legislation does not necessarily have an “anti-regulatory bias” (even if this bias underlies such a strengthening) because it is

80. See Art. 9(7) on “Reservations”, in Ch. 9 “Cross-border trade in services” of CETA.

81. Therefore, Art. 8(15) CETA misuses the term “exceptions” in order to refer to what should properly be called “exemptions” (see *supra* note 14).

82. This issue is quite abundantly discussed, see following footnote. From the perspective of specific pieces of legislation, the reader could usefully take some time to read two pieces of secondary law: first, Directive 2000/14/EC of the European Parliament and of the Council of 8 May 2000 on the approximation of the laws of the Member States relating to the noise emission in the environment by equipment for use outdoors, O.J. 2000, L161/1, with its 78 thick pages of small print, full of designs and formulae. It is pretty clear that Member State legislation daring to impose such requirements would be found contrary to the *Cassis de Dijon* case law. Would a Directive be considered so? The second is the EU legislation on banking. If a very reasonable and sensible obligation imposed by the French legislation was found by the ECJ contrary to the primary law on establishment, does it mean that many more detailed provisions in that secondary law (much more restrictive and much more dependent on the political judgment of the legislature) are also contrary to primary law? There is no doubt that the ECJ is much stricter when analysing the compatibility with primary law of Member States’ legislation than when it analyses that of EC/EU harmonizing rules (an approach which, furthermore, makes sense from the perspective of “positive integration”).

compatible with a strengthening of the EU regulation through secondary law.⁸³ *CETA's obligations apply also to EU secondary law and restrict not only the regulatory capacity of Member States but also that of the EU itself.*

- (ii) Second, because we know, from the first EEA Opinion of the ECJ,⁸⁴ that provisions with identical texts may have different meanings in the EC/EU context and in the context of bilateral EC/EU agreements with third countries. Obligations and provisions that promote integration in the framework of the EC and EU Treaties can have deleterious effects for integration in the context of bilateral agreements with third countries that do not embed the integrationist rationale of the EU Treaties.⁸⁵
- (iii) Third, because, in the EU framework, the strengthening of the restrictions imposed to Member States legislations is modulated and tempered by the interpretation by the ECJ. Whereas, in the CETA context, the strengthening of the restrictions on regulation (not only by Member States but by the EU itself) is left to the judgment of an international dispute settlement mechanism (see the next section) completely separated from that of the ECJ.

The two main consequences of this audacious leap forward are, first, it grants to Canadian investors – either natural persons or companies – a right that EU citizens and companies do not have. If we take France, for example, it is clear that French companies and citizens do not have in France the market access

83. On “regulation”, “deregulation” etc. in EU law, see Armstrong, *Regulation, Deregulation, Re-regulation: The Paradoxes of EU Governance* (Kogan Page, 2000), who underlines a paradox of EU governance, which pursues a “deregulatory liberal economic agenda” and, at the same time, is an “over-zealous regulator” in many areas. See also Weatherill, “Constitutional issues in the implementation of EC law: Addressing the imbalance in favour of market deregulation”, Paper for the fifth biennial international conference on European Community Studies Association (Seattle, 1997), <www.aei.pitt.edu/2751/1/002719_1.pdf> (last visited 15 June 2017), analysing the relationships and imbalances between two species of Community law, the “law of market integration” and the “law of market regulation”; Weatherill (Ed.), *Better Regulation* (Hart Publishing, 2007); and Dawson, “Better regulation and the future of EU regulatory law and politics”, 54 CML Rev. (2016), 1209–1236.

84. Opinion 1/91, *European Economic Area Agreement – I*, EU:C:1991:490.

85. There is a very relevant example in the TFEU Chapter on capital and payments (which also covers “investment”). It could be argued that a provision of primary law (Art. 63) establishing complete liberalization of capital movements between Member States is “integrationist”. But when the very same provision extends this liberalization to capital movements to and from third countries, the provision becomes “anti-integrationist” because it restricts the Union’s margin of manoeuvre in the area of macroeconomic policy and e.g. creates a nearly insurmountable difficulty for the Union to adhere to an international agreement establishing some restrictions on movements of capital (this problem already appeared in the discussion of whether the Union could establish some sort of “Tobin tax”).

rights granted to Canadians by CETA's Article 8(4). Even more significantly from the perspective of European integration: it is clear that German or Swedish companies and citizens do not have in France the market access rights granted to Canadians by CETA's Article 8(4).⁸⁶ This "reverse discrimination" (*"discrimination à rebours"*), however shocking for many, does make sense in some cases, precisely concerning foreign direct investment/establishment. For example, it seems reasonable that an international agreement on investment institutes, in the area of expropriation, some rules of uniform law granting some rights to foreign investors even if national ones do not have them. The objective of the agreement is not that of guaranteeing to foreign investors that they will be treated "as badly as" national investors but to guarantee them some absolute level of protection, even if nationals do not have this.

Secondly, and most importantly, CETA completes the surrender of EU law to the combined and compounded influence of GATS and NAFTA/BITs. In CETA, any EC/TFEU "flavour" or "soul" has been lost and the "positive/negative" integration dynamics have been surrendered to an anti-regulationist objective. In the Treaty of Rome there was no need to refer to the "right to regulate" concerning establishment, because it was never put into question by the obligation to grant national treatment. Conversely, the more CETA expands its lists of exceptions, the more it refers to the preservation of the "right to regulate", the more it demonstrates the anti-regulationist bias of its main foundations.

This anti-regulationist bias is demonstrated best in a sort of Freudian *lapse* committed by the EU in a hidden but revealing sentence included in CETA. Indeed, when the EU introduces its Schedule of Reservations in Annex II of CETA (p. 1295, *sic*), it defines "internal market for services and establishment" and "right of establishment" as follows: "An internal market on services and establishment means an area without internal frontiers in which the free movement of services, capital and persons is ensured. *The right of establishment means an obligation to abolish in substance all barriers to establishment* among the parties to the regional economic integration agreement by the entry into force of that agreement" (emphasis added). This definition of right of establishment, importing the notion of "barriers", so typical of the trade jargon, as "an obligation to abolish in substance all barriers" is completely different from that given by the TFEU: "[R]estrictions on the freedom of establishment of nationals of a Member State in the territory

86. Of course, CETA cannot be construed as an "agreement between EU Member States" either. It is an agreement between two sides, with Canada on one side and the EU and its Member States on the other. The interested reader could compare it with the DR-CAFTA agreement, which, contrariwise, is not only an agreement of the different Central American countries (and the Dominican Republic) with the United States, but also an agreement between the former.

of another Member State shall be prohibited.” It is very revealing that, in such an important question of principle, the EU does not copy-paste from the TFEU, but invents an *ad hoc* anti-regulationist definition.⁸⁷

6. CETA on procedure: Setting up a mechanism of investor-to-State dispute settlement applicable to the European Union

CETA originally included an ISDS mechanism, following the trend that EU Member States have followed for decades in their individual BITs (and a mechanism that is also included in NAFTA, and the large majority of PTAs with investment Chapters). It is important to note that CETA does not follow, in this issue, GATS, which, like all WTO agreements, only envisages a State-to-State dispute settlement mechanism.

The existence of ISDS has become one of the main points of criticism of IIAs, although several voices also defend the existence of this mechanism.⁸⁸ By way of reaction to these criticisms, CETA “improves” this dispute settlement mechanism, establishing a standing investment tribunal and an appellate court for investment disputes between investors and host States, in contrast to the *ad hoc* nature of the arbitral tribunals that are appointed under traditional ISDS.

We do not want to enter into this political-legal discussion as far as the application of the mechanism to States is concerned (in fact, the three authors’ views are not completely coincident on this political judgement). We wish to

87. The invention can certainly claim some foundation in the ECJ’s case law, as we already discussed. But it goes much further than that case law, and reveals a sort of anti-regulatory obsession. First, it adds “by the entry into force of that agreement”, meaning that “barriers” should be eliminated from the very beginning (a condition that, of course, not even the EEC/TFEU fulfils). Second, it does not add the nuances introduced by the ECJ itself in its case law.

88. This debate has been very intense with regard to ISDS provisions in the Trans-Pacific Partnership (TPP), the CETA and, particularly, the negotiations of the Transatlantic Trade and Investment Partnership (TTIP). See *inter alia* Quick, “Why TTIP should have an investment chapter including ISDS”, 49 *JWT* (2015), 199–209; Kumm, “An empire of capital? Transatlantic investment protection as the institutionalization of unjustified privilege”, 4 *ESIL Reflections* (2015), <www.esil-sedi.eu/node/944> (last visited 17 June 2017); Henckels, “Protecting regulatory autonomy through greater precision in investment treaties: The TPP, CETA, and TTIP”, 19 *Journal of International Economic Law* (2016), 27–50; Schacherer, “TPP, CETA and TTIP between innovation and consolidation – Resolving investor-State disputes under mega-regionals”, 7 *Journal of International Dispute Settlement* (2016), 628–653; Laird, “TPP and ISDS: The challenge from Europe and the proposed TTIP investment court”, 40 *Canada and United States Law Journal* (2016), 106–125; and Tietje and Crow, “The reform of investment protection rules in CETA, TTIP and other recent EU-FTAs: Convincing?” (2016), <www.ssrn.com/abstract=2885279> (last visited 17 June 2017).

concentrate on the *specific issue of the application of the mechanism to the EU*, whose “constitutional” system is completely different from that of any State. From this perspective, what matters is not the improvements that, according to the European Commission,⁸⁹ CETA introduces in the mechanism by comparison to NAFTA and BITs, but its main “constitutional” characteristic.

In CETA, there is an innovation, by reference to NAFTA/BITs, concerning the relationship between international settlement of investment-related disputes and procedures before internal jurisdictions. There is no definitive “fork-in-the-road” provision,⁹⁰ but the whole purpose of the mechanism remains to avoid parallel proceedings. Investors can seek redress in national courts, but then move to file a claim before the CETA Investment Tribunal. It is not clear how this can or would work in practice, but what is relevant for us is:

- a) that the mechanism applies also to the EU, as established by Article 8(21) on the “determination of the respondent for disputes with the European Union or its Member States” and;
- b) that the mechanism allows a company established in a Member State and controlled by Canadian nationals or companies to escape the jurisdiction of the ECJ. This is clearly established in Article 8(23).⁹¹

This is indeed the main point: in conformity with this set of provisions, CETA’s investment courts system allows foreign investors in an EU Member State to escape the jurisdictional control of national jurisdictions and, more significantly, that of the ECJ. This means that foreign investors, *and the companies they own or control in a EU Member State*, have a possibility open

89. The Commission states that the new investment court system included in CETA will “be public, not be based on temporary tribunals, have professional and independent judges, work transparently, limit the grounds on which an investor can challenge a State, and prevent public bodies from being forced to change legislation or pay damages”: see Commission, “CETA explained: Creating opportunities for your business”, <www.ec.europa.eu/trade/policy/in-focus/ceta/ceta-explained/> (last visited 15 June 2017).

90. Meaning that, once a road is taken (international or domestic procedure), there is no possibility to move to the other road.

91. Art. 8(23) CETA: “1. If a dispute has not been resolved through consultations, a claim may be submitted under this Section by: (a) an investor of a Party on its own behalf; or (b) *an investor of a Party, on behalf of a locally established enterprise which it owns or controls directly or indirectly*. 2. A claim may be submitted under the following rules: (a) the ICSID Convention and Rules of Procedure for Arbitration Proceedings; (b) the ICSID Additional Facility Rules if the conditions for proceedings pursuant to paragraph (a) do not apply; (c) the UNCITRAL Arbitration Rules; or (d) any other rules on agreement of the disputing parties” (our emphasis).

to them that nationals of that EU Member State and companies owned or controlled by them do not have: so, a “treatment better than national treatment”. But, as we have said before, this, however shocking, does not necessarily contradict EU primary law, and, for some issues, it can even make sense in an international treatment on investment.

The decisive problem lies in the fact that the “locus” of the judiciary is completely different in the EU and EU Member States national constitutional frameworks. In the national constitutional frameworks, constitutions contain very few provisions on the judiciary and leave to the legislature the regulation of the judiciary, including, in particular, its competences. Therefore, it could be construed that the legislature can also deprive the judiciary (by ratifying an international treaty) of some of the competences it has given to it by law.

The situation is completely different in EU law, however. In the EU’s “constitutional” framework, there is no “law on the judiciary”. The whole structure and competences of the judiciary are established by primary law. Therefore, the EU legislature cannot (by concluding an international treaty) deprive the judiciary of the competences conferred to it by primary law (and cannot deprive legal and natural persons – and EU Member States themselves – of their rights to have recourse to the EU’s judiciary system when it is competent, in particular when what is at stake is the conformity of EU law with CETA).

It must be underlined that the hypothesis we are discussing has absolutely nothing to do with others that have already been considered by the ECJ since its two Opinions on the Agreement on the European Economic Area, which essentially discussed its dispute settlement procedures. In this case and others, the point of discussion was a dispute settlement mechanism between EU Member States, or the EU as such, with third countries: an international dispute.⁹² The hypothesis we are discussing in CETA is that of *a juridical person incorporated in a EU Member State which, because it is owned or controlled by a foreign investor, is able to escape, in an internal dispute with the EU (or one of its Member States), the internal jurisdiction of the ECJ*. This has no EU jurisprudential precedent.⁹³ In our opinion, there is no doubt that

92. Opinion 2/13, *Accession of the European Union to the ECHR*, EU:C:2014:2454, could, nevertheless, be relevant because it concerns disputes involving individuals and States. More relevant could be Opinion 1/09, *Draft agreement on the creation of a unified patent litigation system*, EU:C:2011:123, where the envisaged agreement would create a unified patent litigation system with a Patents Court. *Prima facie*, it seems that the arguments developed by the ECJ that led it to declare such an agreement incompatible with EU primary law apply, even more, to the investment courts system instituted by CETA. However, we do not want to overload this article by bringing in this discussion.

93. The Energy Charter Treaty is not a valid precedent for the purposes of this article because it has never been brought to the consideration of the ECJ. From a political perspective,

offering to individual and legal persons the possibility to escape the jurisdiction of the ECJ is manifestly contrary to the EU Treaties.

7. Conclusions

In the preceding sections we have tried to examine the facts (legal facts, but facts) surrounding the evolution of investment regulation in the EU.

We believe that the development of EU law and policy in the area of foreign investment, in the last 25–30 years, has increasingly been influenced by elaborations that have taken place outside the EU framework, mainly by GATS, NAFTA and BITs, and that the movement in this direction has accelerated in CETA. If that analysis of the evolution is true, some questions necessarily arise: Is this correct from the point of view of EU law coherence? Is this right in terms of integration? Does this benefit EU citizens and their allegiance to the EU integration process and their authorities?

These are political questions that can legitimately receive different answers. We have our own opinions (and, as we have already said, they do not fully coincide). However, we are not alone in believing that the Treaty of Rome was a remarkable and well-oriented legal and political achievement, which put into motion a very robust integration process that achieved, in only 25–30 years, a great success. We are very doubtful about the soundness of sacrificing its Chapter on establishment, in the area of external economic relations, in order to import other approaches completely alien to the logic of European integration.

In our opinion, this development in the area of external economic relations also sheds new light on the development of EU secondary law and ECJ's case law in the area of the internal market. The underlying rationale and the analytical approach are the same in both areas: construing right of establishment in EU law as a “right to exercise an economic activity” (both for foreigners and nationals) and not as a rule on national treatment that respects the regulatory capacity of Member States, provided that it is not discriminatory (*de iure* and *de facto*) and subject to the possible (and welcomed) exercise by the EU of its harmonizing competences. The historical

it must be taken into account that the Energy Charter (and even the Energy Charter Treaty) were signed (1991 and 1994, respectively) before the failed negotiations of the Multilateral Agreement on Investment in the OECD framework (1995–1998) raised the awareness on all international investment-related issues. From a legal perspective, the proliferation of disputes that have taken place in recent years between individual Member States and companies established in them, but owned or controlled by nationals and companies of other Member States, simply proves how the possible dangers we analyse in the text can become reality, *involving not only Member States, but also the EU.*

context is also the same (a factor that analysts have not sufficiently emphasized):

- a) Internationally, the appearance of the GATS and NAFTA/BITS approaches in the first part of the 1990s; and,
- b) internally, the change of approach by the European Commission, from harmonization of Member States legislation in very sensitive sectors (in particular, energy and public ownership of industrial and commercial firms), where it certainly, and unfortunately, failed to achieve sufficient results, towards simply curtailing the exercise by Member States of their regulatory capacity; applying this approach, the law of external economic relations becomes a welcome means to further restrict Member States ability to regulate.

This approach is very dangerous and may be the object of legitimate criticism, but it certainly makes sense. The problem appears when the development in the internal area, addressed mainly “against” Member States, becomes, in the external area, a development, also, “against” the EU itself and the exercise of its regulatory capacity. This borderline is the one that CETA clearly crosses. First, because it compounds the influences of GATS and of NAFTA/BITS, never so compounded in the past, and will complete, if it ultimately enters into force, the surrender of EU law to these two legal orders. Second, because, by locking-in this approach in an EU international agreement, it undermines the regulatory capacity not only of Member States but of the EU itself. Thirdly, because, by removing from the effective control of the EU jurisdiction disputes involving companies established in EU Member States, it erodes one of the main pillars of EU integration: the role of the ECJ.

If the analysis is correct, the underlying rationale of the approach becomes obvious: the rationale was not, and is not, one of favouring integration but one of favouring deregulation. The developments in the external economic relations area unveil the rationale of the developments in the area of the internal market. Was (is) the ECJ aware of it? Furthermore, is the ECJ aware that, besides being an instrument of de-regulation, it has become an instrument for “GATSizing”, “NAFTAsizing” and “BITSizing” EU law?